Mayban Factoring Bhd v Koperasi Pekerja-Pekerja Jabatan Perdana Menteri Malaysia Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–447 OF 1996

SHAIK DAUD, ABDUL HAMID MOHAMAD AND ABDUL KADIR SULAIMAN JJCA

3 AUGUST 2001

Agency *— Authority of agent — Ostensible authority — Act of secretary, whether binding on principal — Secretary is also member of principal's board of directors — Whether secretary in acknowledging receipt of documents was acting on behalf of principal — Conduct of secretary not communicated to principal — Whether conduct of secretary could be imputed to principal*

Contract *— Assignment — Factoring agreement — Notice of factoring acknowledged by secretary of debtor, whether binding on debtor — Secretary failed to inform debtor of factoring arrangement — Ostensible authority of secretary, whether acts of secretary could be imputed to debtor — Whether assignment of debts was absolute and enforceable against debtor*

One Mukhtar bin Muda trading as Mejamok Enterprise ('Mejamok') was the appointed supplier of mineral pots to the respondent. Mejamok issued a total of seven invoices involving the purported purchase by the respondent of various mineral pots to a total value of RM390,964. At the request of Mejamok, the appellant approved factoring facilities to it to include the amount covered by the said seven invoices. Mejamok gave notice to the respondent which was acknowledged by the secretary of the respondent. A formal factoring agreement was entered into between Mejamok and the appellant concerning the assignment of its existing and future invoices to the appellant. Following that Mejamok assigned to the appellant the seven invoices affecting the respondent. On each of the invoices there was an acknowledgement by the secretary of the respondent as to the receipt of various items mentioned therein. The respondent neglected to settle the amount due under the said invoices to the appellant despite demand made. The appellant caused a writ to be issued against the respondent. The respondent denied the claim of the appellant averring that it was not involved in the transaction relating to the invoices and received no notice of the factoring arrangement the appellant had with Mejamok. The High Court judge held that the act of the secretary who had acted beyond his authority could not bind the respondent and dismissed the appellant's claim. The appellant appealed.

Held, allowing the appeal:

(1) The secretary on the evidence was not an ordinary person. Apart from being such he was also a member of the respondent's board of directors. He was also authorized to receive all documents

meant for the respondent and indeed in this case, on behalf of the respondent, he acknowlegded and gave consent to the factoring arrangement between Mejamok and the appellant. Hence the knowledge of the factoring arrangement. He also acknowledged the receipt of all the items mentioned in the respective invoices meant for the respondent. In all those instances, it could not be denied that he was acting on behalf of the respondent (see p 344E–F, I).

(2) The fact that the secretary did not inform the respondent of the transactions was not the concern of the appellant, it being an internal matter of the respondent. If at all there was any misrepresentation made or fraud committed by the secretary acting in the course of the respondent's business, under s 191 of the Contracts Act 1950 the conduct was imputed on the respondent. In the circumstances the respondent could not escape the liability to the appellant, an innocent party, in respect of the debts which arose out of the factoring agreement made with notice though not communicated to it by its authorized agent (see pp 344I–345B).

(3) The appellant was entitled to rely on the ostensible authority of the secretary to act on behalf of the respondent. As far as the appellant was concerned, its right over the respondent was created by the factoring agreement, the notice of which was properly given to it. The assignment of the debts due from the respondent to Mejamok was an absolute assignment under s 4(3) of the Civil Law Act 1956 enforceable by the appellant against the respondent (see p 345C–D).

[Bahasa Malaysia summary

Seorang bernama Mukhtar bin Muda yang berniaga sebagai Mejamok Enterprise ('Mejamok') telah dilantik sebagai pembekal bekas air mineral kepada responden. Mejamok telah mengeluarkan sejumlah tujuh invois yang melibatkan pembelian oleh responden tentang pelbagai bekas air mineral yang keseluruhannya berjumlah RM390,964. Atas permintaan Mejamok, perayu telah meluluskan kemudahan kewangan pemfaktoran yang termasuk jumlah yang ditampung oleh ketujuh-tujuh invois tersebut. Mejamok telah memberikan notis kepada responden yang mana telah diakui oleh setiausaha responden. Satu perjanjian pemfaktoran rasmi telah disempurnakan antara Mejamok dan perayu berkaitan dengan penyerahhakan invois-invoisnya yang ada dan pada masa hadapan kepada perayu. Berikutan itu Mejamok telah menyerahhakkan kepada perayu ketujuh-tujuh invois tersebut yang melibatkan responden. Di dalam setiap invois tersebut terdapat pengakuan oleh setiausaha responden berhubung penerimaan pelbagai butiran yang disebutkan di situ. Responden telah mengabaikan untuk menjelaskan jumlah yang perlu dibayar di bawah invois-invois tersebut kepada perayu

meskipun tuntutan dibuat. Perayu telah menyebabkan satu writ dikeluarkan terhadap responden. Responden telah menafikan tuntutan perayu dengan menegaskan bahawa ia tidak terlibat di dalam transaksi berhubung invois-invois tersebut dan tidak menerima apa-apa notis pengurusan pemfaktoran perayu dengan Mejamok. Hakim Mahkamah Tinggi telah memutuskan bahawa tindakan setiausaha tersebut yang telah bertindak melebihi kuasa beliau tidak boleh mengikat responden dan menolak tuntutan perayu. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan tersebut:

(1) Setiausaha tersebut berdasarkan keterangan bukan setiausaha yang biasa. Selain daripada menjadi setiausaha, beliau juga ahli lembaga pengarah responden. Beliau juga diberi kuasa untuk menerima semua dokumen yang ditujukan untuk responden-responden dan sememangnya dalam kes ini, bagi pihak responden, beliau telah mengakui dan memberikan kebenaran untuk pengurusan pemfaktoran antara Mejamok dan perayu. Oleh itu terdapat pengetahuan tentang pengurusan pemfaktoran tersebut. Beliau juga mengakui penerimaan semua butiran yang disebutkan di dalam invois-invois masing-masing yang ditujukan untuk responden. Di dalam semua keadaan tersebut, tidak boleh dinafikan bahawa beliau telah bertindak bagi pihak responden (lihat ms 344E–F, I).

(2) Hakikat bahawa setiausaha tersebut tidak memberitahu responden tentang transaksi-transaksi tersebut bukan urusan perayu, di mana ia merupakan hal dalaman responden. Jika sekalipun terdapat salah tanggap yang telah dibuat atau fraud yang telah dilakukan oleh setiausaha tersebut semasa menjalankan perniagaan responden, di bawah s 191 Akta Kontrak 1950 perbuatan tersebut boleh dikaitkan (imputed to) dengan responden. Di dalam keadaan tersebut responden tidak boleh melarikan diri daripada liabiliti terhadap perayu, pihak yang tidak bersalah, berhubung hutang-hutang yang timbul daripada perjanjian pemfaktoran yang telah dibuat dengan notis tersebut walaupun tidak dimaklumkan kepadanya oleh ejen yang telah diberikan kuasa (lihat ms 344I–345B).

(3) Perayu berhak untuk bergantung kepada kuasa zahir setiausaha untuk bertindak bagi pihak responden. Sejauhmana yang berkaitan dengan perayu, haknya ke atas responden telah diwujudkan oleh perjanjian pemfaktoran tersebut, di mana notis tersebut yang telah diberikan dengan betul kepadanya. Penyerahhakan hutang-hutang yang perlu dibayar daripada responden kepada Mejamok adalah penyerahhakan mutlak di bawah s 4(3) Akta Undang-Undang Sivil 1956 yang boleh dikuatkuasakan oleh perayu terhadap responden (lihat ms 345C–D).]

[*Editorial note:* The respondent's (Koperasi Pekerja-Pekerja Perdana Menteri Malaysia Bhd) application to the Federal Court vide Civil Application No 08–46 of 2001(W) for leave to appeal was dismissed on 24 September 2001.]

Notes

For cases on the ostensible authority of an agent, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 654–658.

For cases on factoring agreement, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1916–1919.

Cases referred to

Mahesan v Malaysian Government Officers Co-operative Housing Society Ltd [1975] 1 MLJ 77 (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)
Contracts Act 1950 s 191
Cooperative Act 1948

Simon Hue Fook Chuan (*Ringolow & Simon Hue*) for the appellant.
Jeyakumar Palakrishnar (*Zahir Jeya & Zinal*) for the respondent.

Abdul Kadir Sulaiman JCA (delivering judgment of the court):**.**
One Mohd Mukhtar bin Muda @ Abu Bakar, trading as Mejamok Enterprise ('Mejamok') at the material time was the appointed supplier of mineral pots to the respondent. Mejamok issued a total of invoices involving the purported purchase by the respondent of various mineral pots to a total value of RM390,964.

At the request of Mejamok, the appellant, on 14 June 1991, approved factoring facilities to it to include the amount covered by the said seven invoices. By a letter dated 15 June 1991, Mejamok gave notice to the respondent, as follows:

> Setiausaha
> Koperasi Pekerja-Pekerja
> Jabatan Perdana Menteri Malaysia Bhd
> Kuala Lumpur
>
> Dear Sirs,
>
> *Factoring — Mayban Factoring Bhd*
>
> In order to help with our expansion plans, we have agreed to factor our invoices with Mayban Factoring Bhd ('MFB'). Our aim in so doing is to benefit from their expertise in looking after our sales accounting and in addition, to have access to further funds when required. The new arrangement will relieve us to devote all our efforts to providing you with the highest level of service.

Please note that all present and future receivables, have and will be factored to MFB and all future invoices will bear a notice of such factoring to them. Because of this transfer of title, it is necessary for you to make all payments direct to:

Mayban Factoring Bhd
32nd Floor, Menara Maybank
100 Jalan Tun Perak
50050 Kuala Lumpur
Peti Surat 11560
50750 Kuala Lumpur
Tel No: (03) – 238-5130
Fax No: (03) – 238-5134

In order to obtain a valid discharge of your debts, statements will be rendered from time to time by MFB who will be pleased to answer any querry on your account; however, your lines to us, of course, remain open. One further point arising from the purchase by Mayban Factoring Bhd of our debts, is that set offs and contra arrangements cannot now be made and all invoices should be settled gross.

Please pay and continue to pay to MFB all receivables even though the invoices may not carry the notice previously mentioned until you are notified in writing to the contrary by MFB.

Kindly confirm your acceptance of the above arrangement by signing and returning the confirmation slip attached, to MFB at the address stated above.

Thanking you in anticipation of your cooperation.

Yours faithfully,

.....
Pengarah Urusan
Mejamok Enterprise
cc Mayban Factoring Bhd

The respondent entered its acknowledgement at the bottom of the copy of the said letter in the following terms:

To: Mayban Factoring Bhd
I/We acknowledge and consent to the above factoring arrangement and expressly agree to make direct payments to you and abide by the terms and conditions set out above.

..... 15 June 1991

Date
Name : (Mohd Nasir bin Zabidin)
Designation : Setiausaha
Koperasi Pekerja-Pekerja
Jabatan Perdana Menteri
Malaysia Bhd
Tel No : 2923144

It is to be noted that the dealings Mejamok had with the respondent relating to the matter covered by the invoices was through the then secretary cum director of the respondent, who was authorized to attend to all daily correspondences involving the respondent.

On 17 June 1991, a formal factoring agreement was entered into between Mejamok and the appellant concerning the assignment of its existing and future invoices to the appellant. Following that, Mejamok assigned to the appellant the following seven invoices affecting the respondent, all dated 16 May 1991 involving the supply of various types of mineral pots:

	References	Value
(a)	MP/4M/91/1772	RM 53,086
(b)	MP/4M/91/1773	RM 91,104
(c)	MP/4M/91/1774	RM 28,618
(d)	MP/4M/91/1775	RM 79,940
(e)	MP/4M/91/1776	RM 39,480
(f)	MP/4M/91/1777	RM 60,326
(g)	MP/4M/91/1778	RM 38,410
	Total	RM390,964

On each of the invoices, there was an acknowledgment by the secretary of the respondent as to the receipt of the various items mentioned therein. Also, on each was a notice of the factoring by the appellant of the account of Mejamok and a notice to the effect that any returns or objections to the account or its terms must be reported to the appellant within 14 days after the receipt, or else the account shall be deemed to be conclusive and binding on the respondent.

As events turned out, the respondent neglected to settle the amount due under the said invoices to the appellant, despite demands made. So, on 26 December 1991, the appellant caused a writ to be issued in the High Court against Mejamok (for the balance of the factoring facilities offered by the appellant to it), against Norisah bt Ghazali (as a guarantor of the facilities), and against the respondent in the sum of RM39,096, being the amount factored through the above invoices, as mentioned earlier, interest and costs.

By its statement of defence, the respondent denied the claim of the appellant averring that it was not involved in the transaction relating to the invoices and received no notice of the factoring arrangement the appellant had with Mejamok. It is further averred that the then secretary of the respondent had admitted that he had signed several blank forms and had witnessed the falsification of the respondent's papers by a third party including the forging of the signature of the chairman, thereby committing a fraud upon the appellant and the respondent.

A The matter went for a hearing before the learned judge in the High Court. SP1, the appellant's executive officer (operations) gave evidence, inter alia, that on 15 June 1991, he went over to meet the secretary of the respondent who confirmed that the seven invoices were genuine and that the goods had been supplied and payments would be made by the respondent direct to the appellant within 90 days from the date stated on B the invoices. The witness also testified that monthly statements of the debts incurred by virtue of the seven invoices were regularly sent to the respondent but no objection as to their accuracies was received from the respondent in respect of each of the items in the statements. Mejamok had accordingly been paid the total amount of RM390,964 mentioned in the C seven invoices.

For the respondent, one of the witnesses was its chairman who gave evidence to the effect that any purchase of materials must have the prior sanction of its loan committee, which in respect of the said seven invoices, no record of such sanction had ever been given. The witness, however, D admitted that the respondent has had previous dealings, albeit occasionally with Mejamok who was its appointed agent for the supply to it of mineral pots.

On the whole of the evidence before him, the learned judge identified two issues in order to resolve the dispute between the appellant and the E respondent. Firstly, was there a lawful debt due from the respondent to Mejamok. Secondly, if there was such a lawful debt, was the debt properly assigned to the appellant by Mejamok pursuant to the terms and conditions stipulated in the factoring agreement. He found that Mejamok did not deliver the said mineral pots to the respondent, and as such there was no lawful debt due from the respondent to Mejamok which the latter could F assign to the appellant pursuant to the factoring agreement. The respondent, being a cooperative established under the Cooperative Act 1948, its secretary was not its employee authorized to purchase the subject goods mentioned in the invoices. As such, Mejamok had not delivered the goods to the respondent in order to commit the latter with any lawful debt. Such being the case, there was nothing that Mejamok could lawfully assign G to the appellant. On the question of notice of the assignment being given to the respondent either through the letter of 15 June 1991 mentioned earlier or through the printed notice on the respective invoices, the learned judge on his holding that the secretary has no authority to act on behalf of the respondent, was of the view that such notices were ineffective for the reason H that they were all addressed and received by the secretary who did not bring it to the attention of the respondent. However, surprising enough, the learned judge in his judgment accepted that on the authority of *Mahesan v Malaysian Government Officers Co-operative Housing Society Ltd* [1975] 1 MLJ 77, the secretary was at the material time the agent of the respondent. However, on the facts of the case, he held that the act of the I secretary could not bind the respondent who had acted beyond his authority. For all those reasons, the learned judge dismissed the claim of the appellant with costs.

Being dissatisfied with the decision of the learned judge, the appellant appealed. We heard the appeal and on 11 June 2001, we delivered our oral decision unanimously allowing the appeal of the appellant with costs. We now provide our reasons for doing so.

As the facts were not really in dispute, the only issue before us is whether the dealings had between Mejamok and the secretary of the respondent in matters relating to the seven invoices would bind the respondent, thereby resulting in its liability to pay the amount stipulated therein in the sum of RM390,964 to the appellant by virtue of the factoring agreement dated 17 June 1991, entered into between the appellant and Mejamok, and the notice to the respondent of the factoring arrangement. There is no doubt that at the material time, the secretary of the respondent was its agent as so found by the learned judge. However, before us, the learned counsel for the respondent argues that by virtue of s 191 of the Contracts Act 1950 ('the Act'), the act and conduct of the secretary would not affect his principal, the respondent, as he was not empowered to deal with Mejamok on behalf of the respondent, or otherwise for not informing the respondent of the dealings. Section 191 of the Act states:

> Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or fraud committed, by agents, in matters which do not fall within their authority, do not affect their principals.

We disagree with the line of submission by the learned counsel. The secretary, on the evidence, was not an ordinary person. Apart from being such, he was also a member of the respondent's board of directors. He was also authorized to receive all documents meant for the respondents and indeed in this case, on behalf of the respondent, he acknowledged and gave consent to the factoring arrangement between Mejamok and the appellant. Hence, the knowledge of the factoring arrangement. He also acknowledged the receipt of all the items mentioned in the respective invoices meant for the respondent. The seven invoices relates to seven separate orders duly made and certified by the secretary as evidenced in the following purchase orders:

	Purchase Order No	Date
(a)	KOOPJPM / SU / 110	8 April 1991
(b)	KOOPJPM / SU / 111	8 April 1991
(c)	KOOPJPM / SU / 112	8 April 1991
(d)	KOOPJPM / SU / 113	8 April 1991
(e)	KOOPJPM / SU / 114	8 April 1991
(f)	KOOPJPM / SU / 115	8 April 1991
(g)	KOOPJPM / SU / 116	8 April 1991

In all those instances, it cannot be denied that he was acting on behalf of the respondent. The fact that he did not inform the respondent of the transactions is not the concern of the appellant, it being an internal matter

of the respondent. The respondent admitted that it has had dealings previously with Mejamok who was its appointed agent in the supply of mineral pots. Hence, Mejamok was not a total stranger to the respondent. If at all there was any misrepresentation made, or fraud committed by the secretary acting in the course of the respondent's business, under s 191 of the Act, the conduct is imputed on the respondent. In the circumstances, the respondent cannot escape the liability to the appellant, an innocent party, in respect of the debts which arose out of the factoring agreement made with notice, though not communicated to it by its authorized agent. As stated earlier, the appellant is not concerned with the internal affairs involving the respondent and its secretary. At the very least, on the facts, the appellant was entitled to rely on the ostensible authority of the secretary to act on behalf of the respondent. As far as the appellant is concerned, its right over the respondent was created by the factoring agreement, the notice of which was properly given to it. The assignment of the debts due from the respondent to Mejamok was an absolute assignment under s 4(3) of the Civil Law Act 1956, enforceable by the appellant against the respondent. Therefore, the learned judge has erred in dismissing the claim of the respondent. The decision of the learned judge was therefore, set aside, and judgment was entered in favour of the appellant as claimed, with costs here and below. The deposit paid is to be refunded to the appellant.

Appeal allowed.

Reported by Jafisah Jaafar